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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CONNELLY, Defendant and Appellant.	H031729 (Santa Clara County Super. Ct. No. 195423)

Defendant challenges the constitutionality of his commitment to the Department of Mental Health (DMH) for an indeterminate term under the recently amended Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, § 6604 et seq.)[1] He argues that his indeterminate commitment violates due process, because it: (1) places the burden on the him to prove he is no longer a sexually violent predator; and (2) fails to provide for mandatory periodic review hearings on the question whether continued commitment is warranted. He also argues that indeterminate commitment violates the prohibition against ex post facto laws and double jeopardy because it renders the SVPA punitive; that the combination of indeterminate commitment with limited judicial review violates the equal protection clause; and that the limits on judicial review violate his First Amendment right to petition the court for redress of grievances. Finally, he argues that

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

his commitment should be reduced to two years because he has been prejudiced.[2] We reject these arguments and affirm the court's order committing defendant to the DMH.

BACKGROUND

Defendant was first committed to the DMH pursuant to the SVPA for two years as a sexually violent predator on July 11, 1997. He was recommitted for successive two-year terms in June 1999, June 2001, June 2003, and May 2005. He admitted the allegations of the commitment petitions in 2001, 2003, and 2005.

On September 20, 2006, Senate Bill No. 1128 (2005-2006 Reg. Sess.) became law. (Stats. 2006, ch. 337.) On November 7, 2006, the voters approved Proposition 83, an initiative measure. (§ 6604.) Both laws provide for the indeterminate commitment of persons found to be sexually violent predators.

On May 15, 2007, the Santa Clara County District Attorney filed a petition to extend defendant's commitment "for the period prescribed by law." On June 8, 2007, the parties submitted the petition to the court for decision on the basis of the most recent reports by the state's evaluators. The court found the allegations of the petition true and committed defendant to the Department of Mental Health for an indeterminate term.

DISCUSSION[3]

The Original SVPA

As originally enacted, effective January 1, 1996, the SVPA provided for a two-year term of confinement for persons civilly committed as sexually violent predators.

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[2] Defendant also argues that he has not waived any of his arguments by lack of objection. Inasmuch as the Attorney General expressly declines to argue forfeiture, we do not address defendant's lack of waiver and ancillary ineffective assistance of counsel claims.

[3] The historical facts are not relevant to our resolution of the constitutional issues presented. Therefore, we do not recite them.

(Stats. 1995, ch. 763, § 3.) The confinement and treatment of such persons was predicated on certain findings made beyond a reasonable doubt, by a unanimous jury verdict, after a plenary trial (former §§ 6603, subd. (d)), former § 6604). (*People v. Williams* (2003) 31 Cal.4th 757, 764; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143, 1147.) A person's initial commitment could not be extended beyond that two-year term unless a new petition was filed requesting a successive two-year commitment. (Former §§ 6604, 6604.1.) On filing of that petition, a new jury trial would be conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e).)

The original Act defined an SVP as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Former § 6600, subd. (a).) A "sexually violent offense" includes a Penal Code section 288 lewd act on a child under age 14. (Former § 6600, subd. (b).) Under the Act, a person is "likely" to engage in sexually violent criminal behavior (i.e., reoffend) if he or she "presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922.) The SVPA is "designed to ensure that the committed person does not 'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.' " (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th at p. 1177.)

Under the original Act, in addition to the provision of a jury trial every two years, there were "two ways a defendant can obtain review of his or her current mental condition to determine if civil confinement is still necessary. [First,] [s]ection 6608 permits a defendant to petition for *conditional* release to a community treatment program. … [Second,] [s]ection 6605 [requires] an annual review of a defendant's mental status

that may lead to *unconditional* release." (*People v. Cheek* (2001) 25 Cal.4th 894, 898, fn. omitted.)

The Amended SVPA

"On September 20, 2006, the Governor signed the Sex Offender Punishment, Control, and Containment Act of 2006, Senate Bill No. 1128 (2005-2006 Reg. Sess.) (Senate Bill 1128). (Stats.2006, ch. 337.) Senate Bill 1128 was urgency legislation that went into effect immediately. (Stats.2006, ch. 337, § 62.) Among other things, it amended provisions of the SVPA to provide the initial commitment set forth in Welfare and Institutions Code section 6604 was for an indeterminate term. (Stats.2006, ch. 337, § 55.)" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281.)

"At the November 7, 2006 General Election, the voters approved Proposition 83, an initiative measure. (Deering's Ann. Welf. & Inst. Code (2007 supp.) appen. foll. § 6604, p. 43.) Proposition 83 was known as 'The Sexual Predator Punishment and Control Act: Jessica's Law.' (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) Among other things, Proposition 83 'requires that SVPs be committed by the court to a state mental hospital for an undetermined period of time rather than [a] renewable two-year commitment….' (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) analysis of Prop. 83 by Legis. Analyst, p. 44.)" (*Bourquez v. Superior Court, supra,* 156 Cal.App.4th at p. 1281.)

Section 6604 of the SVPA now provides: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an *indeterminate* term to the custody of the [DMH] for appropriate treatment and confinement…." (Italics added.)

While Proposition 83's 2006 amendments (hereafter "the 2006 amendments") made some changes to the predicate offenses which qualify a person for treatment as a sexually violent predator, and to the number of victims, the basic definition of a sexually

violent predator remains substantially the same. The 2006 amendments did not change section 6604's requirement that the *initial* commitment of a person as a sexually violent predator must be based upon unanimous jury or court trial findings made beyond a reasonable doubt. (§ 6604.) As before the 2006 amendments, section 6605 continues to require an annual examination and report to the court about a committed SVP's current condition. (§ 6605, subd. (a).) And, as before, the SVP may retain an expert, or, if indigent, may request that the court appoint an expert, to examine him or her and review the records in connection with the annual review. (§ 6605, subd. (a).)

However, section 6605, as amended, changed the nature and scope of the annual report. Formerly, section 6605, subdivision (b), required the director of DMH to notify the SVP of his or her right to petition the court for conditional release under section 6608, and to include in that notification a waiver of rights form. The director was then charged with forwarding the notice and waiver form to the court with the annual report. If the SVP did not waive his or her right to petition the court, the court was required to set a show cause hearing to "determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged." (Former § 6605, subd. (b).) At the "show cause" hearing, the SVP was entitled to counsel. (*Ibid*.)

Section 6605 now provides, in relevant part: "(a) … The annual report [following a current examination] shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community. The [DMH] shall file this periodic report with the court that committed the person under this article. The report shall be in the form of a declaration and shall be prepared by a professionally qualified person. A copy of the report shall be served on the prosecuting agency involved in the initial commitment and upon the committed person. *The person*

may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person. [¶] (b) If the [DMH] determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall order a show cause hearing at which the court can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney, or the committed person." (Italics added to indicate language retained from original act.)

The 2006 amendments did *not* change the provisions regarding the court's consideration of the SVP's DMH-sponsored petition for release. If, at a show cause hearing on that petition, the trial court determines there is probable cause to believe the person's mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged, the court must set a hearing (i.e., a trial) on the petition for discharge. (§ 6605, subd. (c).)

Furthermore, section 6605, subdivision (d), continues to provide (without amendment): "At the [evidentiary] hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. … The committed person also shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests

an appointment. The burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he or she is a danger to the health and safety of others and is likely to engage in sexually violent criminal behavior if discharged." If the court or jury finds in the committed person's favor, the person shall be unconditionally released and discharged. (§ 6605, subd. (e).)

Moreover, the 2006 amendments do *not* change the procedures when the DMH fails to authorize the committed person to file a petition for release. Pursuant to section 6608, the person may petition for conditional release or unconditional discharge, without the DMH's authorization. (§ 6608, subd. (a) ["Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the [DMH]…"].) As before, if the SVP prevails upon his or her petition, he or she must spend a year in a conditional release program before the court may hold a hearing on the SVP's readiness for unconditional release. (§ 6608, subd (d); *People v. Cheek*, *supra*, 25 Cal.4th at p. 902 ["Section 6608, which provides for conditional release to a community treatment program, does not mention section 6605, and permits a defendant to be unconditionally released only after the defendant has spent a year in a conditional release program"].)

Also, section 6608, subdivision (i), was *not* amended and continues to provide that on a committed person's section 6608 petition for conditional release: "In any hearing authorized by this section, *the petitioner shall have the burden of proof by a preponderance of the evidence.*" (Italics added.) After a trial court denies a section 6608 petition, "the person may not file a new application until one year has elapsed from the date of the denial." (§ 6608, subd. (h).)

Because in 2006 the Legislature and California voters amended section 6604 to make an SVP's term of commitment indeterminate (rather than two years), a committed

person now, in effect, "remains in custody until he successfully bears the burden of proving he is no longer an SVP or the [DMH] determines he no longer meets the definition of an SVP." (*Bourquez v. Superior Court, supra,* 156 Cal.App.4th at p. 1287.)

With these changes in mind, we now turn to the merits of defendant's constitutional challenges to the amended SVPA.

Due Process

At the outset, we note that the United States Supreme Court has never held that civil commitments violate due process because they are indefinite. *Addington v. Texas* (1979) 441 U.S. 418 (*Addington*), *Jones v. United States* (1983) 463 U.S. 354 (*Jones*), *Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*), and *Kansas v. Hendricks* (1997) 521 U.S. 346 (*Hendricks*) all involved indefinite civil commitments. (*Addington,* at p. 421; *Jones*, at p. 361; *Foucha*, at p. 74; *Hendricks*, at p. 353.) The Supreme Court did not suggest that the civil commitment schemes at issue in those cases were constitutionally infirm for that reason. On the contrary, the Court has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. [Citations.] It thus cannot be said that the involuntary confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." (*Hendricks,* at p. 357.) We do not understand defendant to contend otherwise. Nevertheless, there is no question that "[c]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington,* at p. 425.) The question here, essentially, is whether due process requires all of the protections formerly provided by the original SVPA.

a. Placing Burden of Proof on the SVP

Relying primarily on *Addington, Foucha,* and, to a lesser extent, *Hendricks*, defendant contends that his "indeterminate commitment under the revised statute violates

the due process clause of the Fourteenth Amendment because the revised statute improperly places the burden of proof on the [defendant] to prove he should be released." We begin our analysis by reviewing *Addington*, *Jones*, and *Foucha*.

In *Addington*, a mentally ill defendant arrested for a misdemeanor assault was indefinitely committed to a mental hospital after a jury found by "clear, unequivocal and convincing evidence" that he required hospitalization for his own welfare and the protection of others. (*Addington*, *supra*, 441 U.S. at p. 421.) On appeal, the defendant argued that the only standard of proof that satisfied due process in a civil commitment proceeding was proof beyond a reasonable doubt. The Texas Supreme Court concluded that proof by a preponderance of the evidence was sufficient. The United States Supreme Court reversed the Texas Supreme Court, finding that the "preponderance of the evidence" standard was too low to comport with due process, given the liberty interest at stake. (*Id.* at p. 433.) However, the Court also rejected the argument that the only standard of proof that satisfies due process in civil commitment proceedings is proof "beyond a reasonable doubt." (*Id.* at p. 430.) On this point the Court observed: "The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. [Citation.] The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. [Citation.] However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." (*Id.* at pp. 428-429.) The Court held that the middle level burden of proof by clear and convincing evidence struck "a fair balance between the rights of the individual and the legitimate concerns of the state" and satisfied due process. (*Id*. at p. 431.)

In *Jones*, the defendant was arrested for attempted petty theft, a misdemeanor punishable by a year in jail. Defendant was found not guilty by reason of insanity and committed to a psychiatric hospital for as long as the court and the psychiatric staff of the hospital deemed necessary. (*Jones, supra*, 463 U.S. at pp. 359-360 & fn. 7.) At a statutorily mandated release hearing 50 days later, at which the defendant had the burden of proving by a preponderance of the evidence that he was no longer mentally ill or dangerous (*id.* at p. 357), a hospital psychologist testified that the defendant continued to be actively paranoid schizophrenic and remained a danger to himself and others. The court found that Jones was mentally ill and dangerous as a result of his illness and returned him to the hospital. (*Id.* at pp. 360-361.) More than a year later, at a second release hearing, Jones demanded either his unconditional release or a civil commitment trial at which the government bore the burden of proving him mentally ill and dangerous by clear and convincing evidence to a jury. (*Ibid*.) The trial court denied Jones's request for a full-fledged civil commitment trial, reaffirmed its findings from the 50-day hearing, and continued Jones's commitment as a person found not guilty by reason of insanity. (*Ibid*.) The Court of Appeals for the District of Columbia affirmed the trial court. (*Id.* at p. 361.) The United States Supreme Court affirmed. (*Ibid*.)

The Supreme Court rejected Jones's argument that, after *Addington*, his continued commitment violated due process because "the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence." (*Jones, supra*, 463 U.S. at p. 362.) Instead, the Court reasoned, "[a] verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense and (ii) he committed the act because of mental illness." (*Id*. at p. 363.) The finding beyond a reasonable doubt that the defendant has committed a criminal act indicates dangerousness. (*Ibid*.) Further, automatic commitment upon proof of mental illness by a preponderance of the evidence did not offend due process because the

insanity acquittee himself advanced insanity as a defense, thereby diminishing the risk of an erroneous determination of mental illness. And, the fact that the defendant had committed a criminal act as a result of that mental illness eliminated the risk "that he is being committed for mere 'idiosyncratic behavior.' " (*Id*. at p. 367.) Under these circumstances, the Court found, it was not unreasonable for "Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." (*Id.* at p. 366.) The *Jones* court concluded that the "concerns critical to our decision in *Addington* are diminished or absent in the case of insanity acquittees. Accordingly, there is no reason for adopting the same standard of proof in both cases. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.] The preponderance of the evidence standard comports with due process for commitment of insanity acquittees." (*Id*. at pp. 367-368.)

In *Foucha*, the defendant was found not guilty by reason of insanity and committed to a psychiatric hospital "until such time as doctors recommend[ed] that he be released, and until further order of the court." (*Foucha, supra,* 504 U.S. at p. 74.) Four years later, a three-member panel of hospital doctors recommended Foucha's conditional release because "there had been no evidence of mental illness since admission." (*Ibid.*) The trial court appointed two doctors to evaluate Foucha's current condition and report to the court. In their reports, both doctors concurred that Foucha was presently in remission from mental illness, but neither doctor would " 'certify that he would not constitute a menace to himself or others if released.' " (*Id.* at pp. 74-75.) At the hearing following the reports, one of the doctors testified that Foucha was not suffering from either a "neurosis or psychosis and that he was in 'good shape' mentally, but that he had an 'antisocial personality,' " an untreatable condition that is not a mental disease. (*Id*. at p. 75.) The doctor further testified that Foucha had been involved in fights at the hospital

and that "he, the doctor, would not 'feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people.' " (*Ibid*.) It was stipulated that the other doctor would testify the same way if called. On this basis, "the court ruled that Foucha was dangerous to himself and others and ordered him returned to the mental institution." (*Ibid*.) The Louisiana Supreme Court affirmed Foucha's continued indefinite commitment as an insanity acquittee because "Foucha had not carried the burden placed upon him by statute to prove that he was not dangerous." (*Ibid.*)

The United States Supreme Court reversed, finding that the Louisiana statute violated due process because it permitted the continued civil commitment of an insanity acquittee who no longer met the dual constitutional prerequisites for commitment: dangerousness *and* mental illness. In doing so, the Court reaffirmed its prior holding in *Addington* that a state may not civilly commit a person unless it shows by clear and convincing evidence that the person is mentally ill and dangerous. (*Foucha*, *supra*, 504 U.S. at pp. 75-76, 86, citing *Addington*, *supra*, 441 U.S. at pp. 425-433.) But the *Foucha* court also reaffirmed its holding in *Jones*, *supra*, 463 U.S. 354, that "[w]hen a person charged with having committed a crime is found not guilty by reason of insanity … a State may commit that person without satisfying the *Addington* burden with respect to mental illness and dangerousness." (*Foucha*, at p. 76.) Because the evidence presented at the review hearing showed Foucha, an insanity acquittee, was *not* currently mentally ill, the Court concluded his continued confinement violated his constitutional right to due process. (*Foucha*, at p. 79.)

In our view, *Addington*, *Jones* and *Foucha* do not support defendant's assertion that his civil recommitment to the DMH for an indeterminate term (subject to potential petitions for release pursuant to sections 6605 and 6608) violates his federal constitutional right to due process because the SVPA places the burden on *him* to prove

he is no longer dangerous or mentally disordered.[4] *Addington* held only that, at the initial civil commitment proceeding, the state must bear the burden of proof of mental illness and dangerousness by clear and convincing evidence. In defendant's case, of course, the state has borne that burden five times. Under the current statute, a court or jury must still make the initial determination, beyond a reasonable doubt, that the person to be committed as an SVP is both mentally ill and dangerous. (§§ 6604, 6608.) Thus, *Addington*'s test is more than satisfied.

Defendant asserts that "*Foucha* … dealt with the requisite burden of proof in the context of a hearing to determine whether the continued commitment of an individual was permitted on the basis that he was mentally ill and dangerous." We disagree. As we read *Foucha*, that opinion does not specifically address, much less establish, the burden of proof required at future release hearings. At Foucha's review hearing, which was initiated by the institution, Foucha bore the burden of proving that he was not mentally ill or dangerous. Foucha did not question the placement of that burden on him by Louisiana's statute, and the *Foucha* opinion held only that an insanity acquittee cannot be civilly committed for being dangerous, if he is not also mentally ill. This holding did not depend on who bore the burden of proof, or whether it was by a preponderance of the evidence or clear and convincing proof. On the contrary, we understand *Foucha* to mean that, whoever bears the burden of proof by whatever standard, if the civil committee is not shown to be mentally ill as well as dangerous, he or she cannot be confined. On the other hand, by adhering to its holding in *Jones*, the *Foucha* court made it reasonably clear that, at least in the context of civil commitments following insanity acquittals, due process does not require review hearings at which the government bears the burden of

[4] This issue is currently pending in the California Supreme Court in *People v. McKee* (S162823, rev. granted July 9, 2008).

proving continued dangerousness and mental illness by at least clear and convincing evidence.

Defendant points to the following language in *Foucha* as support for his position that due process requires placement of the burden of proof on the state. (For clarity and context, we include parts of the passage not quoted by defendant.) "[*United States v.*] *Salerno* [(1987) 481 U.S. 739] does not save Louisiana's detention of insanity acquittees who are no longer mentally ill. Unlike the sharply focused scheme of confinement at issue in *Salerno,* the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous. At the hearing which ended with Foucha's recommittal, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. There was only a description of Foucha's behavior at [the hospital] and his antisocial personality, along with a refusal to certify that he would not be dangerous. When directly asked whether Foucha would be dangerous, [the doctor] said only, 'I don't think I would feel comfortable in certifying that he would not be a danger to himself or other people.' [Citation.] This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility." (*Foucha, supra,* 504 U.S. at pp. 81-82.)

Viewed in context, we do not believe this part of *Foucha* suggests that the Louisiana statute at issue there was constitutionally infirm *because* it denied insanity acquittees adversarial review hearings at which the state bore the burden of proof. The Court's comments were made in response to the state's argument that even if he were not mentally ill, Foucha could be indefinitely detained as an insanity acquittee because he

was dangerous, under the rationale of *United States v. Salerno, supra,* 481 U.S. 739. *Salerno* had upheld a federal bail statute against a due process challenge to its provision for the pretrial detention of members of the Genovese crime family charged with RICO (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.) violations, on dangerousness alone. As noted in the *Foucha* opinion, detention under the bail statute was permitted only after a " 'full-blown adversary hearing,' to convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community" and that the duration of the detention was strictly limited by the " 'stringent time limitations of the Speedy Trial Act.' " (*Foucha, supra,* 504 U.S. at p. 81.) In the passage selected by defendant, the *Foucha* court contrasted the procedures for pretrial detention under the bail statute with those of the Louisiana statute to make the point that detention *for dangerousness alone* required more safeguards than the Louisiana statute provided. The Court did not suggest that the Louisiana statute was inadequate to protect the liberty interest of insanity acquittees who were both mentally ill and dangerous.

The amended SVPA also satisfies *Jones*. A finding that a person qualifies as an SVP under the amended SVPA establishes that the defendant has been convicted of committing an act that constitutes a criminal offense, that he or she has a diagnosed mental disorder, and that as a result of that mental disorder he or she is a danger to the health and safety of others because it is likely that he or she will engage in sexually violent predatory criminal behavior. (See CALCRIM No. 3454.) In both the insanity acquittal verdict and SVP verdict contexts, the finding beyond a reasonable doubt that the defendant has committed a criminal act indicates dangerousness, and eliminates the risk that the defendant is being civilly committed because his or her behavior is merely idiosyncratic. Additionally, in the SVP context, the verdict represents a finding by the trier of fact that the person is dangerous.

In the case of an insanity acquittal, automatic commitment without further hearing is made upon proof of mental illness by a preponderance of the evidence. Such commitment does not offend due process because the insanity acquittee advanced insanity as a defense, thus diminishing the risk of an erroneous determination of mental illness. Under the amended SVPA, commitment is premised upon proof beyond a reasonable doubt that the defendant is mentally disordered and, as a result of that disorder, is likely to engage in violent predatory criminal behavior. *Addington* teaches that a verdict supported by proof beyond a reasonable doubt manifests the most concern and the least tolerance for the risk that an erroneous determination of mental illness or disorder will result in a deprivation of liberty. Under these circumstances, it is not unreasonable for California to determine that the SVP finding supports an inference of continuing mental disorder. Here, much as in *Jones*, "[i]t comports with common sense" to conclude that someone who has committed a sexually violent criminal offense in the past, and who has a mental disorder which makes him or her likely to commit such an offense in the future, "is likely to remain ill and in need of treatment." (*Jones*, *supra*, 463 U.S. at p. 366; Civ. Code § 3547 ["A thing continues to exist as long as is usual with things of that nature"].)

The amended SVPA satisfies *Foucha* as well, because the amended Act does not permit the continued civil commitment of an SVP on a finding of dangerousness alone. In short, we find nothing in *Addington*, *Jones*, or *Foucha* that forbids placing the burden of showing changed circumstances warranting release by a preponderance of the evidence on the SVP.

Finally, we see nothing in *Hendricks* that compels a contrary conclusion. The Kansas statutory scheme at issue in *Hendricks* placed the burden on the People to prove mental disorder and dangerousness beyond a reasonable doubt at the initial commitment trial. However, under the Kansas scheme, commitment was indefinite, " 'until such time as the person's mental abnormality or personality disorder has so changed that the person

is safe to be at large.' " (*Hendricks*, *supra*, 521 U.S. at p. 353.) Under Kansas law, the person committed as a sexually violent predator had three avenues of release: (1) upon the court's annual review; (2) at any time, if the institution decided the committee's condition was so changed that release was appropriate; and (3) at any time, upon the committee's petition, "[i]f the court found that the State could no longer satisfy its burden under the initial commitment standard." (*Ibid*.) However, the *Hendricks* court did not pass on the adequacy or necessity of the procedural provisions of the Kansas law. At issue was whether the law's "definition of 'mental abnormality' satisfied 'substantive' due process requirements," and whether the law violated the federal Constitution's Double Jeopardy bar or ex post facto ban. (*Id*. at pp. 356, 360.) In our view, *Hendricks* provides no support for defendant's due process claim regarding the placement of the burden of proof at subsequent review hearings. We therefore conclude that the SVPA, as amended, does not violate defendant's federal constitutional right to due process by placing the burden of proof on the SVP to prove by a preponderance of the evidence that he or she is no longer mentally disordered or dangerous.

b. Lack of Mandatory Periodic Review

Defendant also contends that "indeterminate commitment [under the revised act] violates the due process clause of the Fourteenth Amendment because the revised statute fails to provide for mandatory periodic hearings on the issue of whether continued commitment is warranted." Neither *Addington* nor *Foucha* addresses, much less requires, periodic commitment review hearings. *Addington* did not involve a review hearing, or describe any review mechanism adopted by Texas. Under the statute at issue in *Jones*, the insanity acquittee was entitled to a review hearing 50 days after his commitment, and a judicial hearing every six months at which he had the burden of proving by a preponderance of the evidence that he was no longer mentally ill or dangerous. (*Jones*, *supra*, 463 U.S. at pp. 357-358.) However, the Court in no way indicated that judicial review at six month intervals was constitutionally required. In *Foucha*, the only release

mechanism allowed by statute was hospital-initiated judicial review, and Foucha was confined for four years before he was given a release hearing, yet the court did not comment adversely – or at all – on this aspect of the statutory scheme.

Assuming for the sake of argument that some kind of review is necessary as a matter of due process, we do not read *Addington*, *Jones*, and *Foucha* as constitutionally mandating any particular review mechanism. Indeed, such a conclusion would be at odds with the Court's stated view that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Jones*, *supra*, 463 U.S. at pp. 367-368.)

Defendant argues further that "the indefinite commitment imposed under the revised SVPA improperly and irrationally presumes that once a person is diagnosed with a qualifying mental disorder that such disorder will continue indefinitely." However, as we have noted above, the Supreme Court has found that such an inference is not unreasonable. (*Jones*, *supra*, 463 U.S. at p. 366.)

Citing *Foucha* and *O'Connor v. Donaldson* (1975) 422 U.S. 563, defendant argues: "The revised SVPA creates an unacceptable risk that an SVP detainee who no longer qualifies as a sexually violent predator will have his commitment continued in violation of his right to due process." In *O'Connor*, a former mental patient sued for damages arising out of his involuntary 15-year civil commitment in a state hospital for his paranoid schizophrenia, even though no one ever claimed he was dangerous. Upholding an award of damages, the *O'Connor* court held as a matter of due process that it was unconstitutional for a state to continue to confine a harmless, mentally ill person. Together, *Foucha* and *O'Connor* stand for the principle that a person cannot be civilly committed unless he or she is both mentally ill and dangerous, not that any particular review mechanism is mandated by due process.

As we have indicated above, by requiring a finding beyond a reasonable doubt that the SVP has been convicted of sexually violent offense as defined in section 6600, and is both mentally disordered and dangerous, the initial commitment hearing itself provides a

significant level of due process protection, greater than is required by *Addington.* Moreover, the amended SVPA is not devoid of review mechanisms. An SVP's condition must be reviewed at least annually by the court. (§ 6605.) In connection with that annual review, an SVP may request an evaluation by an independent expert. (*Ibid*.) Additionally, an SVP may petition the court for conditional release or unconditional discharge on a yearly basis (§ 6608), and nothing bars him or her from relying on any independent evaluation provided in connection with the annual court review to show a change in circumstances. Finally, the hospital administration must authorize the defendant to petition the court for his or her conditional release or unconditional discharge, if it believes the defendant is no longer mentally disordered or dangerous. The frequency and number of review opportunities, as well as "the layers of professional review and observation of the patient's condition," (*Addington*, *supra*, 441 U.S. at pp. 428-429) persuade us that the required periodic review provisions of the amended SVPA adequately minimize the risk of an erroneous deprivation of liberty and comport with due process. In our view, due process does not require judicial review hearings at mandated intervals even though no change in mental status or dangerousness has occurred.

Ex Post Facto and Double Jeopardy

Defendant contends that provision for indeterminate commitment by the amended SVPA is punitive in nature and therefore violates the ex post facto clause. Defendant acknowledges that the United States Supreme Court has rejected such a challenge to both the Kansas Sexually Violent Predator Act and Alaska's sex offender registration law because these laws were civil, not criminal, and therefore not punitive. (*Hendricks*, *supra*, 521 U.S. at pp. 361-363, *Smith v. Doe* (2003) 538 U.S. 84, 101-102.) He argues, however, that these cases do not control here because the punitive purpose of the amended SVPA "is evident from the scope of the reforms embodied in both SB1128 and

Proposition 83" and from "the 'intent clause' which accompanied the proposition."[5] We disagree.

A commitment under the SVPA is civil in nature and does not amount to punishment. (See *Hubbart v. Superior Court*, *supra,* 19 Cal.4th at p. 1179 [SVPA did not violate constitutional proscription against ex post facto laws because SVPA does not impose punishment or implicate ex post facto concerns].) "[T]he critical factor is whether the duration of confinement is 'linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.' " (*Id.* at p. 1176.) If it is so linked, then an indefinite commitment does not transgress ex post facto principles.

According to defendant, because Senate Bill 1128 (and subsequently Proposition 83) was intended to increase punishment of sexual offenders, the SVPA has now become punitive in purpose. However, the purpose of the Penal Code amendments made by Senate Bill 1128 or Proposition 83 that increase the punishment for various sex offenses is not relevant to the purpose or effect of the amendments to the Welfare and Institutions Code that provide indeterminate terms for civilly committed SVPs. The stated purpose of *those* amendments is to "strengthen and improve the laws that ... *control* sexual offenders." (Voter Information Guide, *supra,* at p. 138, italics added.) The indeterminate term under California's SVPA is "linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." (*Hendricks*, *supra,* 521 U.S. at p. 363.) This is "a legitimate nonpunitive governmental objective and has been historically so regarded." (*Ibid.*) Nothing in the legislative history suggests that Senate Bill 1128 or Proposition 83 was

[5] This issue is currently pending in the California Supreme Court. See footnote 4 at page 13, *ante*.

intended to do anything other than make the SVPA a more effective civil scheme to protect the public from a small group of exceedingly dangerous individuals.

Defendant also asserts that the provision of indeterminate commitments by the amended SVPA "violates the double jeopardy clause of the Fifth Amendment." He argues that he "was already tried, convicted, and sentenced to state prison for his sexual offenses. Thus, any further punishment for these same offenses is a clear violation of the Double Jeopardy clause." Inasmuch as we have already concluded that the amended SVPA is not punitive, defendant's double jeopardy argument also fails. We conclude that the amended SVPA violates neither the ex post facto clause nor the double jeopardy clause.

Equal Protection

Defendant contends that his "indeterminate commitment with limited judicial review of his custodial status violates the equal protection clause of the Fourteenth Amendment."[6]

To prevail on an equal protection claim, a person must first show that " 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) If that is shown, " '[t]he state must establish both that it has a "compelling interest" which justifies the challenged procedure and that the distinctions drawn by the procedure are necessary to further that interest.' " (*In re Smith* (2008) 42 Cal.4th 1251, 1263.)

Several California appellate cases have considered and rejected equal protection challenges to the SVPA. (*People v. Calderon* (2004) 124 Cal.App.4th 80, 94 [MDOs and SVPs are not similarly situated]; *People v. Lopez* (2004) 123 Cal.App.4th 1306, 1314-1315 [same].) We agree with the cited authority.

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[6] This issue is currently pending in the California Supreme Court. See footnote 4 at page 13, *ante*.

However, even if we assume that SVPs, MDOs, and other civil committees are similarly situated to each other, we nevertheless conclude that their disparate treatment with respect to the length of their commitments and procedures for judicial review is necessary to further a compelling state interest. As the California Supreme Court has noted with respect to the original SVPA, the law "narrowly target[ed] 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' " (*Cooley v. Superior Court, supra,* 29 Cal.4th at p. 253.) Regarding the original SVPA, our Supreme Court has also stated: "The problem targeted by the Act is *acute,* and *the state interests*—protection of the public and mental health treatment—*are compelling.*" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20, italics added.)

In a similar vein, the voters' information pamphlet for Proposition 83 noted that "[s]ex offenders have very high recidivism rates. According to a 1998 report by the United States Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend, and they prey on the most innocent members of our society. More than two-thirds of the victims of rape and sexual assault are under the age of 18. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon." (Voter Information Guide, *supra*, at p. 127.) As we have noted above with respect to defendant's ex post facto claim, the stated purpose of the 2006 amendments providing for the indeterminate commitment of SVPs unless and until they are no longer mentally disordered and dangerous, is to "strengthen and improve the laws that … *control* sexual offenders." (Voter Information Guide, *supra*, at p. 138, italics added.) In our view, the problem sought to be ameliorated by the revised SVPA is no less acute than the problem identified by our Supreme Court in *Hubbart*. Based on the evidence of the voters' intent in passing the 2006 amendments, we conclude that the changes made to the original SVPA with respect to review procedures and length of commitment term were justified by compelling state interests and that the distinctions

drawn by the amendments were necessary to further those interests. Therefore, we reject defendant's equal protection claim.

Right to Petition for Redress of Grievances

Defendant next contends that "the limitations placed on [his] right to petition the court for release [under the revised version of the SVPA] violate[s] his First Amendment right to petition the courts for redress of grievances." Defendant acknowledges that section 6608, subdivision (a) gives the SVP detainee the right to counsel when petitioning the court for release, but he argues that the amended SVPA nevertheless violates the First Amendment because it fails to expressly include a provision for the appointment of a medical expert and thereby denies the detainee "the tools he needs to make the access meaningful." We disagree. Although section 6608 does not expressly provide for the appointment of an expert, section 6605 does. Section 6605 provides that, in connection with the court's annual review, the SVP "may retain, or if he or she is indigent and so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person." (§ 6605, subd. (a).) Thus, when the DMH concludes in its annual report that the committed person remains an SVP, that person can request the appointment of his or her own expert to review that determination. If the SVP's independent expert concludes otherwise, that expert's testimony may be used to support a petition for release under section 6608.

Defendant further argues that the SPVA, as amended, denies the SVP his "federal constitutional right of meaningful access to the courts" because "[a]n SVP detainee does not receive meaningful access to the courts when the State can perpetually incarcerate him without ever being required to prove during a hearing on the merits in court the necessity for the continued incarceration." The burden placed on SVPs to prove the allegations of their petition for release by a preponderance of evidence does not limit

access to the courts in any way; this is the standard imposed in the majority of civil actions. Furthermore, a committed person always has the right to seek release by way of a petition for writ of habeas corpus. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.) We therefore reject defendant's First Amendment challenge to the SVPA.

Prejudice

Finally, defendant argues that he has suffered prejudice "[a]s a result of the unconstitutional and improper application of the revised act to [his] case." Inasmuch as we do not find the amended SVPA unconstitutional, we reject defendant's claim that he has been prejudiced by its application to him.

CONCLUSION

The SVPA, as amended, does not violate defendant's federal constitutional rights under the due process, equal protection, ex post facto, or double jeopardy clauses of the constitution, or his First Amendment right to petition the court for redress of grievances. Therefore, defendant has suffered no prejudice from the application of the amended SVPA to him.

DISPOSITION

The order is affirmed.

McAdams, J.

WE CONCUR:

Rushing, P.J.

Duffy, J.